In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-73

ADELAIDE SHIPPING LINES, LTD.,
SALEN REEFER SERVICES AB, and M. V. GLADIOLA,
Petitioners,

vs.

SUNKIST GROWERS, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION

GRAYDON S. STARING
FREDERICK W. WENTKER, JR.,
Two Embarcadero Center
San Francisco, California 94111
Attorneys for Petitioners

LILLICK MCHOSE & CHARLES
R. LAWRENCE KURT
Two Embarcadero Center
San Francisco, California 94111
of Counsel

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7852

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-73

ADELAIDE SHIPPING LINES, LTD.,
SALEN REEFER SERVICES AB, and M. V. GLADIOLA,
Petitioners,

vs.

SUNKIST GROWERS, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION

I

IT IS A PERVASIVE FALLACY OF RESPONDENT'S BRIEF THAT THE "ACTUAL FAULT OR PRIVITY OF THE CARRIER" AND "DESIGN OR NEGLECT OF [THE] OWNER" HAVE BEEN FOUND IN THIS CASE WHEREAS THE TRUTH IS THAT THE DIRECT OPPOSITE HAS BEEN EXPLICITLY FOUND.

It is evidently the purpose of Respondent's Brief to mislead the Court as to the facts found below and thereby create the impression that no question of law is involved

and that the Court of Appeals' opinion was merely a lengthy theoretical speculation.

The facts upon which the petition here rests are indeed settled and uncontested. They are the facts found by the District Court below and left undisturbed by the Court of Appeals. Respondent blandly proclaims that "the material facts are uncontroverted," but goes on to make extraordinary assertions showing that what Respondent really contends is that the shipowner and charterer agree with the Respondent as to existence of actual fault or privity at high managerial levels which, if true, would establish liability under COGSA and constitute design or neglect of the owner under the Fire Statute. Can it be supposed that Respondent actually believes this, or that the Court of Appeals was mistaken on this point when it noted that the facts were "not seriously in dispute"?[1]

It is the function of the District Court to find the facts and the function of the Court of Appeals to treat questions of law on the basis of the facts so found unless those facts be explicitly overturned under proper standards of fact review. A finding of fact may be overturned only when it is determined to be clearly erroneous,[2] which means that "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[3] The

[1]Opinion, Appendix 2-B.

[2]Fed. R. Civ. P. 52(a).

[3]United States v. Oregon Medical Society, 343 U.S. 326, 339 (1952).

standard is no different because this is an admiralty appeal.[4]

A finding as to privity is a finding of fact[5] and a finding as to "design or neglect" under the Fire Statute is the same thing.[6] The District Court explicitly found twice over that the fire was "not caused by the actual fault, privity, design, or neglect of the vessel owner or charterer" (Finding 35, App. 10-A; see also Finding 18, App. 5-A) and elaborated the point by making it clear that the faults which could be laid to the owner or charterer (and were later dealt with as such by the Court of Appeals) were faults of the crew rather than of the high level managerial employees whose involvement would import privity of the charterer or design or neglect of the owner. (Findings 32 and 34, App. 9-A and 10-A).

These findings of lack of actual fault or privity and design or neglect were not held to be clearly erroneous by the Court of Appeals. Nowhere did that court point to evidence which could have formed the basis of such a holding or assert a "definite and firm conviction" of mistake in regard to those findings. Indeed, had the Court of Appeals overturned the findings as clearly erroneous[7]

[4]McAllister v. United States, 348 U.S. 19, 1954 A.M.C. 1999 (1954).

[5]Waterman Steamship Corp. v. Gay Cottons, 414 F.2d 724, 738, 1969 A.M.C. 1682, 1701 (1969); Farrell Lines, Inc. v. Jones, 530 F.2d 7, 10, 1976 A.M.C. 1639, 1643-44 (1976).

[6]A/S J. Ludwig Mowinckels Rederi v. Accinanto, Ltd., 199 F.2d 134, 143, 1952 A.M.C. 1681, 1695 (4th Cir. 1952); Great Atlantic & Pac. Tea Co. v. Lloyd Brasileiro, 159 F.2d 661, 1947 A.M.C. 306 (1947).

[7]Neither Respondent's citations on Page 3 of its Brief nor reference to those same cases by the Court of Appeals below can serve to establish actual fault or privity or design and neglect with respect

there would have been no legal issue to discuss and all of the opinion would have been without point, since the petitioners, if in privity, would be clearly liable under the law as it has heretofore stood. Instead, the Court of Appeals, following a lengthy discussion, imposed upon the owner and charterer a requirement of due diligence to make the vessel seaworthy at and before the commencement of the voyage, for the only possible purpose of making their lack of privity irrelevant to a holding of liability against them.

It is astounding now to find the Respondent trying to make this Court believe that privity was found by the Court of Appeals, so as to lead this Court to believe that there is no issue of law presented by the Petition. Such disingenuous playfulness with the facts by the Respondent betrays a remarkable concern about coming to grips with the serious question of law presented.

II

RESPONDENT'S DISCUSSION OF THE CONFLICTING CASES IS MISLEADING.

Respondent's complaint that the *Hoskyn* case[8] made no reference to COGSA does not alter the fact that it arose under COGSA. The lack of reference to COGSA only tends to confirm our point, since no charterer was involved and, under the view which has obtained until the present case,

to the training of the crew or the use of an improper ferrule in this case. The cases cited are, in contrast to this case, simply instances in which the facts showed, and the trial court found, high managerial involvement and therefore privity and consequently "design and neglect".

[8]Hoskyn & Co., Inc. v. Silver Line, Ltd., 143 F.2d 462, 1944 A.M.C. 895 (2d Cir. 1944).

the Fire Statute applied in full vigor to owners, pursuant to section 8 of COGSA (46 U.S.C. § 1308), as we contend it still does and the Court of Appeals in this case denies.

Respondent dismisses the discussions in the *American Tobacco Company*,[9] *A/S J. Ludwig Mowinckels Rederi*,[10] and *Automobile Insurance Company*[11] cases as *dicta*. Of course, a determination that there was no fault at all does reduce discussion of privity to the technical status of *dictum*. But the positive and extended discussions of the question of privity under COGSA and design and neglect under the Fire Statute in these cases cannot be so lightly dismissed, when they have formed the doctrinal background for the determination of liability in other cases in their own and other courts. And it is certainly not at all correct to say that only *dictum* was involved in the *A/S J. Ludwig Mowinckels Rederi* case, where the court, for the purpose of its discussion, assumed the existence of faulty stowage on the part of the stevedore; the ruling there is at least an alternative holding. Nor is it so clear that *dictum* was involved in the *Automobile Insurance Company* case, since the court's discussion of the issue there involved its rejection of an attempt by cargo to resort, as here, to other statutory provisions to impair the effect of the Fire Statute.

[9]American Tobacco Co. v. The KATINGO HADJIPATERA, 81 F. Supp. 438, 1949 A.M.C. 49 (S.D.N.Y. 1948), *modified*, 194 F.2d 449, 1951 A.M.C. 1933 (2d Cir. 1951).

[10]A/S J. Ludwig Mowinckels Rederi v. Accinanto, Ltd., 199 F.2d 134, 1952 A.M.C. 1681 (4th Cir. 1952).

[11]Automobile Ins. Co. v. United Fruit Co., 224 F.2d 72, 1955 A.M.C. 1429 (2d Cir. 1955).

All three of the cases just discussed are also said by Respondent to involve *dicta* because they concern negligent stowage. This novel position is without rational foundation and untenable in light of *Consumers Import Co. v. Kabushiki Kaisha Kawasaki Zosenjo,* 320 U.S. 249, 250, 1943 A.M.C. 1209, 1210 (1943).[12]

Beyond what has already been said in the petition, it is sufficient, with respect to the *Asbesto Corp.* case,[13] upon which the Court of Appeals below and Respondent so heavily rely, to point to the Respondent's statement on page 7 of its Brief that in that case "the facts show not only a lack of due diligence but also personal 'design or neglect' and 'actual fault or privity.' " This clearly renders unnecessary, and therefore also *dictum,* any discussion of a a requirement of "due diligence" as a pre-condition, if indeed that is what the court were there discussing.

The *Hershey Chocolate Corp.* case[14] was not cited as a holding on the point here ~~but~~ because Judge Kilkenny, when he wrote that opinion, explicitly accepted the application to COGSA of this Court's decision in *Earle & Stoddart, Inc. v. Ellerman's Wilson Line, Ltd.,* 287 U.S. 420, 1933 A.M.C. 1 (1932) and other cases which he here rejects.

[12]Astute counsel for cargo in their footnote 6 reserve their position to assert improper stowage as unseaworthiness in the future as in the past.

[13]Asbestos Corp. Ltd. v. Compagnie de Navigation Fraissinet et Cyprien Fabre, 480 F.2d 669, 1973 A.M.C. 1683 (2d Cir. 1973).

[14]Hershey Chocolate Corp. v. The SS ROBERT LUCKENBACH, 184 F. Supp. 134, 1960 A.M.C. 1143 (D. Ore. 1960), *aff'd sub nom.* Albina Engine & Machine Works, Inc. v. Hershey Chocolate Corp., 295 F.2d 619, 1961 A.M.C. 2215 (9th Cir. 1961).

III

CONSIDERATIONS OF INTERNATIONAL UNIFORMITY ARE IRRELEVANT AND ILLUSORY.

Respondent asserts that the decision below should not be reviewed because international uniformity in giving effect to the Hague Rules is desirable and because the decision below is shown to be in conformity with Canadian law. It is a little much to say that conformity with Canada constitutes international uniformity. However that may be, the search here is for the meaning of two Acts of Congress, one of which, the Fire Statute, has no international counterpart and the other of which, COGSA, includes an explicit provision[15] requiring that the Fire Statute be given full effect, and thereby making COGSA non-uniform in fire cases. Indeed, the Hague Rules, by reserving all rights under various national statutes for limitation of liability,[16] accepted the disuniformity arising from the variety statutes.

IV

RESPONDENT'S ATTACK UPON THE TIMELINESS OF THE PETITION IS UNFOUNDED

The judgment of the Court of Appeals was entered March 8, 1979. By an Order dated March 16, 1979, under Fed. R. App. P. 40(a), the Court of Appeals extended the time from March 23 to April 3, 1979 for filing a petition for rehearing. The petition for rehearing was filed April 3, 1979 and was denied April 19, 1979. The petition here

[15]46 U.S.C. § 1308.

[16]International Convention for the Unification of Certain Rules Relating to Bills of Lading (Hague Rules, 1924), Article VIII, 6A Knauth, Benedict on Admirality, pp. 869-79 (7th rev. ed. 1969).

was filed July 16, 1979, eighty-eight days later, and was therefore timely.[17] As reference to the petition for rehearing will quickly show, the shipowner and charterer sought there, as they do here, to reverse the decision of the Court of Appeals imposing a precondition of due diligence to make seaworthy and therefore to reinstate the District Court's judgment exonerating them from liability. Respondent's characterization of the petition for rehearing is astonishing and its contention of untimeliness is frivolous.

CONCLUSION

For the reasons stated in the petition and because of the lack of any cogent and candid argument against them, the petition should be granted.

GRAYDON S. STARING
FREDERICK W. WENTKER, JR.,
Attorneys for Petitioners

LILLICK MCHOSE & CHARLES
R. LAWRENCE KURT
of Counsel

---

[17] Bowman v. Loperena, 311 U.S. 262 (1940); *cf.* Leishman v. Associated Wholesale Electric Co., 318 U.S. 203 (1943).